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MICHAEL RODAK, JR., C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-473

DANIEL T. TAYLOR, III,

Petitioner,

—v.—

JOHN P. HAYES, Judge, Jefferson Circuit Court, Criminal Branch, Second Division,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

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The American Civil Liberties Union files this brief pursuant to Rule 42 of the Rules of the Supreme Court of the United States. Both Petitioner and Respondent have consented to the filing of this brief. Copies of the consents have been filed with the Clerk of this Court.

INTEREST OF *AMICUS*

The American Civil Liberties Union is a nationwide nonpartisan organization of over 250,000 members devoted solely to the protection of the liberties safeguarded by the Bill of Rights. During its fifty-three year existence the ACLU has consistently asserted that imprisonment for any offense is constitutionally invalid when imposed without due process of law. We believe that even in summary contempt proceedings, due process of law is constitutionally indispensible. Because we believe that petitioner in this case was denied the measure of due process required in summary contempt convictions, we file this brief to urge reversal of his conviction.

ARGUMENT

PETITIONER'S CONVICTION MUST BE REVERSED SINCE HE WAS NOT AFFORDED A PROPER DUE PROCESS HEARING ON THE CONTEMPT CHARGES

Petitioner's brief describes how the various contempt citations were imposed on him. The first count was subsequently withdrawn by the trial judge. The second count arose after petitioner tried to submit certain evidence concerning his client's escape from custody which the court had ruled inadmissible. Petitioner was cited for "completely ignoring the Court's ruling" (Tr. 1081). Petitioner responded for the record but did so primarily on the substantive question of the admissibility of the evidence.

On Count 3, the trial judge simply said: "The Court is holding Mr. Taylor in contempt for the second time during the trial for smarting off to the Court in open court. That's all I've got to say" (Tr. 1356). Petitioner responded for the record and then engaged in a discussion with the judge about the manner in which he was representing his client.

On the fourth count, the court simply announced that "Mr. Taylor is in contempt of court" (Tr. 1799). No specific charge was levied against petitioner, but in his later written specification the trial judge wrote that petitioner had been "most disrespectful to the court and refused to take his seat at the counsel table as ordered." 494 S.W.2d at 740.

On the fifth count, the trial judge again announced that petitioner was in contempt (Tr. 1956). Once again the discussion about the alleged contempt was intermixed with a substantive point at the trial, in this case an order by the judge that petitioner submit an immediate list of all the witnesses he would be calling at the trial.

On Count 6, the judge held petitioner in contempt and told him he could respond at the next recess (Tr. 2016-17). However, the opportunity did not arise. On Count 7, the trial judge ordered the court reporter not to put petitioner's response in the record (Tr. 2032). The trial judge did not permit petitioner to make a response on the record on Count 8 (Tr. 2069). On Count 9, he again simply informed the petitioner that he was in contempt (Tr. 2172).

After the verdict was rendered in the trial, the judge called the petitioner before the bar and told him that he had put on "the worst display I've ever seen an attorney" engage in. He made other disparaging remarks and then would not permit petitioner to respond:

> "The Court: I want them to understand that your actions should not be their actions because this is not the way that a court is conducted. This is not the way an officer of a court should conduct itself.
>
> Mr. Taylor: I would respond to you, sir–
>
> The Court: (Interrupting) You're not responding to me on anything.

Mr. Taylor: (Interrupting) Oh yes, I will.

The Court: Yes, you're not, either.

Mr. Taylor: Yes, I will.

The Court: The sentence is on Count One–

Mr. Taylor: (Interrupting) Unless you intend to gag me–

The Court: I'll do that–

Mr. Taylor: (Interposing) My lawyers will respond to you–

The Court: (Interposing) I'll do that sir.

Mr. Taylor: My lawyers will respond to you, sir.

The Court: You be quiet, or you'll–there will be some more contempts–

Mr. Taylor: (Interrupting) No, you heard what I said.

The Court: I have you on nine counts. First Count, 30 days in jail; Second Count, 60 days in jail; Third Count, 90 days in jail; Fourth Count, six months in jail; Sixth Count, six months in jail; Seventh Count, six months in jail; Eighth Count, one year in jail; Ninth Count, one year in jail, all to run consecutive.

Take him away.

Mr. Taylor: We will answer you in court.

The Court: I'd be glad to see you." (Appendix, pp. 58-59).

In no significant sense could petitioner be said to have been afforded a due process hearing either during the trial when the contempt citations were handed down or afterwards when sentence was imposed. But this Court has emphasized again and again the importance of a hearing before important substantive rights are lost. "For more than a century the central meaning of procedural due process has been clear: "Parties whose rights are to be affected are entitled to be heard . . ." *Fuentes* v. *Shevin*,

407 U.S. 67, 80 (1972). See also *Morrissey* v. *Brewer*, 400 U.S. 275 (1972); *Goldberg* v. *Kelly*, 397 U.S. 254 (1970).

If a hearing is necessary when property rights are threatened, *a fortiori* it is necessary when a person's liberty is at stake. This Court has outlined the following requirements for a due process hearing in criminal cases: "A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense–a right to his day in court–are basic to our system of jurisprudence." *In re Oliver*, 333 U.S. 257, 273 (1948). This is as true in contempt cases as in any other criminal proceeding: " . . . we have stated time and time again that reasonable notice of a charge and an opportunity to be heard in defense before punishment is imposed are 'basic in our system of jurisprudence.' " *Groppi* v. *Leslie*, 404 U.S. 496, 502 (1972).

A meaningful hearing is necessary in contempt cases even though the conduct that gave rise to the charges took place within the view of the trial judge, for a trial judge must be presumed to be amenable to argument or explanation. There are many matters which might be presented in defense of a summary contempt citation or in mitigation of sentence:

(1) An accused could try to show that his behavior did not "block the judge in the performance of his judicial duty." *In re McConnell*, 370 U.S. 230, 236 (1962). Or he might try to persuade the judge that there was no actual obstruction of the administration of justice. *United States* v. *Meyer*, 346 F.Supp. 973 (D.D.C. 1972).

(2) An accused could try to show that he had no intent to obstruct the administration of justice. "The minimum requisite intent is better defined as a volitional act done by one who knows or should reasonably be aware that his conduct is wrongful." *United States* v. *Seale*, 461 F.2d 345, 368 (7th Cir. 1972).

(3) An accused might try to show that the judge confused

"offense to [his] sensibilities with obstruction to the administration of justice." *Brown* v. *United States* 346 U.S. 148, 153 (1958).

(4) An accused might try to persuade the judge not to impose or to reduce the sentence through his exercise of the right of allocution. "The contemnor has normally been given an opportunity to speak on his own behalf in the nature of a right of allocution." *Groppi* v. *Leslie*, 404 U.S. 496, 504 (1972).

A recent Court of Appeals decision has expressly upheld the right of an alleged contemnor to allocution before sentencing. In *Weiss* v. *Burr*, 484 F.2d 973, 984 (9th Cir. 1973), the Court noted:

> "The last and most difficult question is whether the trial court's contempt procedures in respect to the three remaining citations infringed Weiss' constitutional right to speak in defense and mitigation before being sentenced. See *Groppi* v. *Leslie*, supra, 404, U.S. at 501. We hold that they did. Due process requires that contempts such as Weiss, who are not cited *and* simultaneously punished for the purpose of either restoring courtroom decorum or protecting the safety of court officials are entitled to an opportunity for allocution."

The Second Circuit has very recently held that there must be a meaningful opportunity to be heard in mitigation of the offense. In *United States* v. *Wilson* and *Bryan*, F.2d (2d Cir., Nov. 28, 1973), the court reversed a summary contempt citation imposed on a witness after an orderly refusal to answer certain questions. To the claim that an adequate hearing was given the alleged contemnors, the court said:

> "Nor is the bare 'opportunity to be heard' dispositive here since the 'hearing' was confined to the matter of sentence. If, however, counsel had been given 'a reasonable time for the preparation of the defense' (Fed. R. Crim. P. 42(b));

she might have marshalled and presented facts in mitigation of the charge. Significantly, the record reveals the possibility of a psychiatric defense, at least for Wilson. Some of Wilson's psychological problems, disclosed by a court-ordered study, were explored at an abortive sentencing hearing on his guilty plea, preceding the refusal to testify. With respect to that conviction, Judge Lasker concluded: 'I do not believe that in this complicated case I have sufficient information before me to permit me justly to proceed to sentence with Mr. Wilson.' Shortly thereafter nonetheless, he proceeded to sentence him for contempt. With additional time to prepare a defense, counsel for Wilson might have enlarged on the issue of appellant's mental health, and perhaps shown a relationship between any psychological difficulties and the refusal to serve as a witness. Finally, because of the posture of the case, the record is silent on other facts which may well exist in defense or mitigation of the charge against both appellants, and which could be properly developed at a plenary hearing."

The Advisory Committee on the Judge's Function of the American Bar Association Project on Standards for Criminal Justice has stated:

"F.4 *Notice of charges and opportunity to be heard*

Before imposing any punishment for criminal contempt, the judge should give the offender notice of the charges at least a summary opportunity to adduce evidence or argument relevant to guilt or punishment.

Commentary

Although there is authority that in-court contempts can be punished without notice of charges or an opportunity to be heard, *Ex parte Terry*, 128 U.S. 289 (1888), such a procedure has little to commend it, is inconsistent with the basic notions of fairness and is likely to bring disrespect

upon the court. Accordingly, notice and at least a brief opportunity to be heard should be afforded as a matter of course. Advisory Committee on the Judge's Function of the American Bar Association Project on Standards for Criminal Justice. *The Judge's Role In Dealing with Trial Disruption* 20 (1971).

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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